IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28020-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JAMES RAY FEBUS-GIBSON, also known as JAMES RAY FEBUS,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. ─ James Ray Febus-Gibson appeals his conviction of failing to register as a sex offender. We reject his unanimity, evidence, and opinion-on-guilt contentions, and affirm.

FACTS

Mr. Febus-Gibson was charged with failure to register as a sex offender because he allegedly failed to notify the Spokane County Sheriff's Department he changed his resident address in the state of Washington and failed to send written notice of the address change within 72 hours of moving. The parties stipulated that Mr. Febus-

Gibson had been previously convicted of rape of a child in the third degree, a crime requiring sex offender registration.

Sandra Suriano, Mr. Febus-Gibson's landlady, testified Mr. Febus-Gibson completed a lease for a portion of a duplex located on East Everett on December 1, 2006. In response to a question by the deputy prosecutor, and over defense objection, she also related he never told her he was a registered sex offender.

Detective Jerry Keller testified Mr. Febus-Gibson's last registered sex offender change of address form had been dated August 8, 2005 and listed an address on North Stone. On September 4, 2007, Detective Keller went to the address and found it vacant. His records check did not show a more current address. Detective Keller requested a warrant for Mr. Febus-Gibson on September 11, 2007.

Detective John Grandinetti testified that if an offender moved in December 2006, he would expect to receive a change of address form, but he received none from Mr. Febus-Gibson. The detective testified about a registration law change in 2006 requiring a check-in every 90 days. He related he sent a certified letter to Mr. Febus-Gibson informing him of the changes. Detective Grandinetti testified he had received a return receipt for the certified letter dated September 12, 2006. Defense counsel objected twice unsuccessfully to questions about the notice of the change in law in September 2006, as irrelevant because it was outside charged time. The detective testified no records showed any further contact from Mr. Febus-Gibson after the

September 2006 letter.

Patty Gibson, Mr. Febus-Gibson's mother, testified she helped her son move in December 2006 to around the first of January 2007. She testified she drove Mr. Febus-Gibson to the Public Safety Building so he could report his address change. She did not accompany him into or see him enter the building. She testified Mr. Febus-Gibson returned from the building with his signed paper.

Mr. Febus-Gibson testified he did register his change of address around the first of January, but lost any papers he received. Mr. Febus-Gibson related he additionally sent a letter to the sheriff's department informing them of the change of address, but he did not have any proof of doing so.

Jury instruction 6 stated:

> A person commits the crime of Failure to Register as a Sex Offender if that person resides in Washington State, has a conviction for a sex offense for which he is required to register as a sex offender, and knowingly fails to register with the county sheriff's department by changing his address in the State of Washington and failing to send written notice of the change of address to the county sheriff within 72 hours of moving.

Clerk's Papers (CP) at 12.

The jury found Mr. Febus-Gibson guilty as charged. He appealed.

Unanimity

The issue is whether the trial court erred in failing to instruct on unanimity.

A unanimous verdict is required in Washington criminal cases. *State v. Badda*,

631 Wn.2d 176, 385 P.2d 859 (1963). "[I]n multiple acts cases where several acts are alleged, any one of which could constitute the crime charged, the jury must be unanimous as to which act or incident constitutes the crime." *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991) (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). Lack of jury unanimity is a "manifest error affecting a constitutional right," which can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995). "Failure of the court to give an instruction on unanimity is not reversible error, however, if the record shows that, in fact, the verdict was unanimous; and there are not multiple questions on a single issue." *State v. Rogers*, 5 Wn. App. 347, 349, 486 P.2d 1125 (1971) (citing *Badda*, 63 Wn.2d at 182; *State v. Mickens*, 61 Wn.2d 83, 87, 377 P.2d 240 (1962)).

Here, the jury was properly instructed on the crime elements in the "to convict" instruction in instruction 7:

> (1) That the defendant resided in Washington State;
> (2) That the defendant has a conviction for a sex offense and is required to register as a sex offender;
> (3) That between December 1, 2006 and September 11, 2007 the defendant knowingly failed to register with the county sheriff's office by changing his address in the State of Washington and failing to send written notice of the change of address to the county sheriff within 72 hours of moving;
> (4) That the acts occurred in the State of Washington.

CP at 13.

The sole dispute surrounds the third element. Mr. Febus-Gibson argues the jury

could have found he failed to do an annual update or failed to meet the 90-day check-in requirement. But the third elements instruction was specific. The 90-day check-in and the annual update requirements are not mentioned. The jury was solely instructed to find Mr. Febus-Gibson failed to give written notice of his change of address within 72 hours of moving. We presume the jury followed the court's instruction. The jury was polled to insure unanimity.

Evidence Rulings

The issue is whether the trial court erred in admitting certain evidence. We review evidence rulings for an abuse of discretion. *State v. Young*, 89 Wn.2d 613, 628, 574 P.2d 1171, *cert. denied,* 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978). Discretion is abused when no reasonable person would take the position adopted by the trial court, *In re Marriage of Nicholson*, 17 Wn. App. 110, 114, 561 P.2d 1116 (1977), or when discretion is exercised in a manifestly unreasonable manner or on untenable grounds, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An evidence ruling not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the trial's outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

"All relevant evidence is admissible. . . . Evidence which is not relevant is not admissible." ER 402. "'Relevant evidence' means evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

First, Mr. Febus-Gibson contends the court should not have permitted his landlady to testify that he had not mentioned he was a convicted sex offender. Whether Mr. Febus-Gibson knowingly sought to evade the registration requirements is a matter of consequence. While Mr. Febus-Gibson argues the evidence is too attenuated in showing evasion, in closing the State did argue that even the landlady did not know he was a convicted sex offender until he was arrested. This argument was built on other evidence that explained the registration requirements. In sum, the trial court did not err in allowing the landlady's testimony.

Even if the landlady's testimony was irrelevant, reversal would not be warranted unless a reasonable probability exists that the irrelevant evidence materially affected the trial's outcome. *Halstien*, 122 Wn.2d at 127. Here, the jury instructions plainly established the elements that must be proved beyond a reasonable doubt to convict Mr. Febus-Gibson of the crime of failure to register as a sex offender. Second, Mr. Febus-Gibson contends the court should not have allowed evidence of the September 2006 certified letter or the return receipt. The letter serves to show that Mr. Febus-Gibson received a reminder of his status as a sex offender. As argued by the State, this reminder would negate any possible "mistake" defense that Mr. Febus-Gibson did not know his status or did not know he was required to report in some way. The

evidence tends to make the existence of a fact of consequence more probable than it would be without the evidence. Therefore, the evidence was properly admitted as relevant.

Ultimate Issue Testimony

The issue is whether Detective Keller impermissibly stated the law and opined on Mr. Febus-Gibson's guilt when relating the sex offender registration requirements. This is an issue raised for the first time on appeal because Mr. Febus-Gibson did not object to the testimony at trial.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Where the claimed error is manifest and affects a constitutional right, the party may raise the issue for the first time on appeal. RAP 2.5(a)(3). "An opinion by either an expert or a lay witness on the ultimate question of a defendant's guilt violates his constitutional right to an impartial trial, including the independent determination of the facts by a judge or jury." *State v. Read*, 100 Wn. App. 776, 781, 998 P.2d 897 (2000). An opinion on the ultimate issue of guilt is unfairly prejudicial because it "invad[es] the exclusive province of the finder of fact." *State v. Black,* 109 Wn.2d 336, 348, 745 P.2d 112 (1987). Since improper opinion testimony violates a constitutional right, a defendant may generally raise the issue for the first time on appeal. *State v. Saunders*, 120 Wn. App. 800, 811, 86 P.3d 232 (2004).

Certainly, "questions of fact are to be determined by a jury, and that all matters

of law are to be determined and declared by the court." *Ball v. Smith,* 87 Wn.2d 717, 723, 556 P.2d 936 (1977). Generally, "a witness is not permitted to give his opinion on a question of . . . law or upon matters which involve questions of law." *Id.* at 722-23. And,

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701.

ER 704 partly states "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *See State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002). "Under ER 704, a witness may testify as to matters of law, but may not give legal conclusions." *Id*. at 532. Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant's conduct violated a particular law. *Id.*

In reviewing testimony claimed an impermissible opinion on guilt, we consider: (1) the circumstances of the case, (2) type of witnesses called, (3) nature of the testimony and the charges, (4) defenses invoked, and (5) other evidence presented to the trier of fact. *See State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004).

Here, Detective Grandinetti did not state an opinion on guilt when referring to his file and the log-in books. The detective was a fact witness. The detective related no communication between the sheriff's office and Mr. Febus-Gibson was shown during the relevant time, and the records showed no indication Mr. Febus-Gibson had moved from his North Stone address.

Next, Mr. Febus-Gibson points to this exchange with Detective Grandinetti:

> A. Well, in order to follow the law, he would have been required to check in with the sheriff's office and be put on the schedule for the 90-day check in.
> Q. And did it also ask for an annual update of address?
> A. That's correct.

Report of Proceedings at 81.

Detective Grandinetti did not indicate Mr. Febus-Gibson was guilty of the crime charged, but explained a matter within his expertise, the contents of the letter, an exhibit, and whether a response was required. *See State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (explaining limits of expert opinion on ultimate issues). As noted, the court's "to convict" instruction clearly set the crime elements. Mr. Febus-Gibson was not charged or tried for failing to meet the letter's requirements. The court did not err in allowing Detective Grandinetti testimony.

Conclusion

In sum, the trial court did not err in any of the ways claimed by Mr. Febus-Gibson. Having so concluded, we do not reach his cumulative error contention.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

_____ _____
Kulik, C.J. Sweeney, J.